

Power, Process and Policy in Antitrust

Remarks by Andrew I. Gavil
Professor of Law
Howard University School of Law
Of Counsel, Sonnenschein Nath & Rosenthal, LLP
DOJ/FTC Hearings on Single Firm Conduct
Monopoly Power
Washington, D.C.
March 7, 2007

It's About Anticompetitive Effects

- Common Core Issue in Antitrust
 - Irrebuttable Presumptions (per se rules)
 - Rebuttable Presumptions
 - **Direct Evidence** of Actual Exercise of Market Power
 - E.g. “quick look,” “inherently suspect”
 - Equivalents for Section 2?
 - **Circumstantial Evidence (“Double Inference”)**
 - Market Definition
 - Market Share
 - Inference of Market Power

Symbiosis Between Power and Effects

- Power is a Condition Precedent of Effects
 - Easy Cases
 - Direct and Circumstantial Evidence are aligned
 - Significant, actual effects and high market shares
 - De minimus or no effects and low market shares
 - Hard Cases
 - Direct and Circumstantial Point in Different Directions
 - No actual effects, but high market shares
 - Significant actual effects, but low market shares
- But Evidence of Power and Effects are Interrelated
 - Traditional §2 tests can obscure connections

Differentiating and Managing Direct and Circumstantial Evidence of Effects

- **Benchmark for Circumstantial Evidence: Horizontal Merger Guidelines – Role in § 2?**
 - Recall that *Cellophane* was a Section 2 Case
 - Prospective vs. retrospective methods may differ
- **We Need a Similar Effort to Refine “Actual Exercise” Standards and Harmonize Across Offenses**
 - How much and what kinds of effects evidence should be sufficient to shift a burden?
 - Section 1: *NSPE, NCAA, IFD, CDA, TRU, Polygram*
 - Section 2: *AMR, LePages, Microsoft*

The Weight of the *Alcoa* Paradigm

- Are we ready/do we want to move beyond total reliance on market shares in Section 2?
 - The *Copperweld* “gap” fallacy
 - Role of direct evidence outside Section 1 horizontal?
 - *Re/Max* and Section 2
 - But see *Republic Tobacco* re vertical
 - Clayton §7 – *Staples*?
- Is the **Monopoly vs. Market Power** Distinction Viable? Economically? Legally?
 - Only when linked to market share thresholds?
 - Workable when direct evidence is available?

The Role of Decision Theory

- Fear of **Error Costs** often motivates calls for **more and better evidence** in antitrust cases, especially as to power and effects
 - Market power and effects? Efficiencies?
- Decision theory also requires consideration of **process and information costs**
 - Is “more” really better? Always?
 - Is “zero error” obtainable? At what cost?

An Integrated Legal and Economic Approach to Evidence and Burdens

■ Proposed Test:

- When does **the marginal value of additional evidence in terms of economic certainty** (minimizing error costs) **outweigh the costs of obtaining and processing that evidence**, taking into account whether it is **reasonably accessible to the party bearing the risk of non-persuasion?**
- Some other factors:
 - Information overload and diminishing returns

■ **Application to Monopoly Power**

- Market definition and market share evidence always necessary?
- Actual exercise evidence ever enough alone?
 - Definitions and thresholds needed?

Antitrust and Rocket Science

■ Safe Harbors and False Positives

- Filters for minimal or non-existent threats to competition

■ Danger Zones and False Negatives

- **Burden Shifting Devices** to protect against more obvious threats to competition

■ Sliding Scales

- Not all burden shifts are created equally

